Supreme Court, U.S.
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In The

Supreme Court of the United States

COREY HOOVER,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether §4511.19(A)(2) of the Ohio Revised Code violates the Fourth Amendment to the United States Constitution by imposing a criminal punishment on someone who refuses or revokes consent to a warrantless search through a chemical test of the person's blood, breath, or urine.

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OPINION BELOW

The Supreme Court of Ohio published its opinion in the Ohio Supreme Court Reporter at 123 Ohio St. 3d 418, and the decision is also published in the Northeast Reporter at 916 N.E.2d 1056. The decision of the Ohio Supreme Court overruled the decision of the Third District Court of Appeals in Ohio. The Court of Appeals' decision is published in the Ohio Appellate Reports at 173 Ohio App. 3d 487, and in the Northeast Reporter at 878 N.E.2d 1116. The trial court did not publish its opinion in this matter, and the ruling from the trial court is reprinted in the Appendix.

JURISDICTION

The Supreme Court of Ohio filed its original decision on September 30, 2009, and entered an order denying Petitioner's Motion for Rehearing on December 2, 2009. This Court has jurisdiction under 28 U.S.C. §1257 to review the Ohio Supreme Court's decision on a Writ of Certiorari.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Ohio Revised Code §4511.19(A)(2)

(A)(2) No person who, within 20 years of the conduct described in division (A)(2)(a) of this section previously has been convicted of or pleaded guilty to a violation of this Division (A)(1) or Division (B) of this section, or in municipal OVI offense shall do both of the following:

(a) Operate any vehicle, street car, or trackless trolly within the State while under the influence of alcohol, a drug of abuse, or a combination of them;

(b) Subsequent to being arrested for operating a vehicle, street car, or trackless trolly as described in Division (A)(2)(a) of this section, being asked by a law enforcement officer to submit to a chemical test or tests under section 4511.191 of the Revised Code, and being advised by the officer in accordance with section 4511.192 of the Revised Code of the

consequences of the person's refusal or submission of the test or tests, refuse to submit to the test or tests.

STATEMENT OF THE CASE

On September 8, 2006, Petitioner, Corey Hoover, was subject to a traffic stop by a Sheriff's Deputy in Union County, Ohio, and cited for a violation of Ohio Revised Code §4511.19(A)(2). On October 20, 2006, Petitioner, Corey Hoover, filed a Motion to Dismiss the charge in the Union County Municipal Court alleging that Ohio Revised Code §4511.19(A)(2) violated his constitutional rights under the Fourth Amendment to the United States Constitution, as established in this court's decision of *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930, (1967). By judgment entry filed February 1, 2007, the trial court overruled Petitioner's motion to dismiss.

The matter was then appealed to the Third District Court of Appeals for the State of Ohio. By opinion and entry filed on October 29, 2007, the Third District Court of Appeals in Ohio found the statutory scheme unconstitutional to the extent that it enhanced the mandatory minimum penalty imposed on Defendants who refuse to consent to a warrantless chemical test of the Defendant's blood, breath, or urine. However, the Third District Court of Appeals in Ohio fell short of finding the statute unconstitutional in its entirety.

The State of Ohio then appealed to the Ohio Supreme Court, seeking to overturn the decision by the Court of Appeals. Petitioner, Corey Hoover, then cross-appealed, seeking to have the statute ruled unconstitutional in its entirety. The Supreme Court of Ohio accepted both requests for jurisdiction.

On September 30, 2009, the Supreme Court of Ohio reversed the Third District Court of Appeals, finding that Ohio Revised Code §4511.19(A)(2) was constitutional and did not violate the Fourth Amendment to the United States Constitution. A Petition for Reconsideration was filed, and the Ohio Supreme Court overruled Petitioner's Motion for Reconsideration on December 2, 2009.

ARGUMENT

I. This Court should determine whether the Fourth Amendment to the United States Constitution prohibits states from enacting criminal statutes that criminally punish a Defendant's refusal or revocation of consent to a warrantless search.

a. The Legislature for every state in the Union has impliedly consented to a warrantless search on behalf of individual people charged with drunk driving.

According to the most recent data collected by the National Highway Traffic Safety Administration,

there were over 1.4 million drivers arrested in 2005 for driving under the influence of alcohol or narcotics. *Nat'l Highway Traffic Safety Admin., Dep't of Transp., Traffic Safety Facts, Breath Test Refusals, DOT HS 810 871 (2007).* The arrest rate for DWI[1] related offenses equates to 1 for every 139 licensed drivers in the United States. *Id.*

To combat the problem, State legislatures have enacted strict laws against driving while intoxicated. State legislatures have also imposed both administrative and criminal sanctions for refusal to submit to a chemical test under "implied consent" statutes. To date, every State (including the District of Columbia) has passed an "implied consent" statute. "Implied consent" statutes are based upon the principle that all motor vehicle operators have implicitly consented to submit to a lawfully requested test to determine the alcohol content in their blood, breath, urine, or other bodily substance as a condition of receiving a driver's license. All States, but Nevada, have administrative sanctions for a driver who refuses to consent to a warrantless chemical test to determine the alcohol content in their blood, breath, or urine. *Nat'l Highway Traffic Safety Admin., Dep't of Transp., Traffic Safety Facts, Blood Alcohol Concentration Test Refusal Laws, DOT HS 810 884W (2008).*

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[1] "Driving While Impaired" – used as a general term for the various offenses of driving under the influence of alcohol or other substances.

b. Almost half of the States in this Country have enacted laws that impose criminal punishment on individuals who refuse or revoke consent to a warrantless search of their blood, breath, or urine.

In addition to administrative sanctions for drivers who refuse to submit to tests to determine their alcohol content, State legislatures have enacted statutes that criminally punish individuals who refuse chemical tests at an increasingly rapid pace. In January 2008, 15 States had criminal sanctions for refusal to submit to blood alcohol concentration tests. *Nat'l Highway Traffic Safety Admin., Dep't of Transp., Traffic Safety Facts, Blood Alcohol Concentration Test Refusal Laws, DOT HS 810 884W (2008).* To date, 20 States have enacted criminal sanctions for the refusal to submit to blood alcohol concentration tests, and Missouri Senator Matt Bartle recently introduce State Bill 780, which makes refusing a chemical test a separate crime, equivalent to a first time DWI. See, Alaska Stat. §28.35.032(f) (2010); Cal. Vehicle Code §23612(D) (2009); Fla. Stat. Ann. §316.1939(1) (2009); Idaho Code §18-8002(3)(a) (2009); K.S.A. §8-2118(c) (2008); Ky. Rev. Stat. Ann. §189A.105(2)(a)(1) (2010); La. Rev. Stat. Ann. §32:666(A)(1)(c) (2009); Md. Transp. Article Ann. §27-101(x)(3) (2010); Me. Rev. Stat. Ann. Tit. 29-A, §2521(3)(c) (2009); Minn. Stat. §169A.51(2)(2) (2009); R.R.S. Neb. §60-6, 197(3) (2009); N.J. Stat. §39:4-50a(a) (2010); Ohio Revised Code §4511.19(A)(2) (2010); O.R.S. §813.095(2) (2007); 75 Pa. Cons. Stat. §3804(c) (2009); R.I. Gen. Laws

§31-27-2.1(b)(2) (2010); Tenn. Code Ann. §55-40-406(a)(6) (2009); Va. Code Ann. §18.2-268.3(B)(v) (2009); 23 V.S.A. §1210(b) (2010).

In 2007, the National Highway Traffic Safety Association in partnership with Mid-America Research Institute conducted a study to determine breath test refusal rates. State refusal rates in 2005 varied from 2.4 percent to 81 percent, with the average refusal rate of 22.4 percent. *Nat'l Highway Traffic Safety Admin., Dep't of Transp., Traffic Safety Facts, Breath Test Refusals, DOT HS 810 871 (2007).* With over 1.4 million drivers arrested in 2005 for driving under the influence, a 22.4 percent refusal rate equates to roughly 313,000 individuals who exercised their constitutional rights and refused to consent to the warrantless search of their blood, breath or urine. Denial of consent, and the potential criminal punishment related thereto, is not an isolated incident, it is a reality that millions of Americans will face in the years to come. The most daunting fact is that State courts have been unable to articulate a consistent justification for why millions of Americans have no constitutional right to refuse chemical tests when suspected of operating a motor vehicle under the influence of alcohol or other substances.

Like many States, Ohio has an "implied" consent statute in Ohio Revised Code §4511.191. Just as other States have done, Ohio then enacted Revised Code §4511.19(A)(2) which creates a criminal offense

separate and distinct from the traditional drunk driving offenses contained in Revised Code §4511.19(A)(1). Furthermore, the criminal offense created in Ohio Revised Code §4511.19(A)(2) specifically criminalizes the act of refusing or revoking consent to a warrantless search of one's blood, breath, or urine.

II. Ohio Revised Code §4511.19(A)(2) is unconstitutional in violation of the Fourth Amendment to the United States Constitution.

It is well settled that the taking of a blood, breath, or urine specimen falls within the search and seizure protections or the Fourth Amendment. *Schmerber v. California*, 384 U.S. 757, 767-68 (1966); *Skinner v. Rlwy. Labor Executives' Association*, 49 U.S. 602, 616 (1989). The Fourth Amendment to the United States Constitution guarantees a criminal suspect the absolute right to refuse consent to a search, and said refusal of consent cannot be punished criminally. *Camara v. Municipal Court*, 387 U.S. 523, 540 (1967). See also, *Lefkowitz v. Cunningham*, 431 U.S. 801, 805-06 (1977) (holding "that Government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized").

Although a search will generally meet Fourth Amendment requirements when consent is given voluntarily, *Katz v. United States*, 389 U.S. 347, 348

(1967), consent was never given by Petitioner in this case. Instead, the legislature "consented" for Petitioner by enacting Ohio's "implied consent" statute, Ohio Revised Code §4511.191. Such a consent by the legislature is not legally binding on Petitioner nor anyone else in Petitioner's circumstances. After all, "[a] suspect may . . . delimit as he chooses the scope of the search to which he consents." *Florida v. Jimeno*, 500 U.S. 248, 252 (1991).

"The Fourth Amendment gives citizens the right to refuse to consent to warrantless searches and seizures." *Gasho v. United States*, 39 F.3d 1420, 1431 (9th Cir. 1994) (citing *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978)). In fact, as recently as 2002, this Court in *United States v. Drayton*, 536 U.S. 194 (2002), reaffirmed the existence of an absolute right to refuse consent to a warrantless search by holding that "knowledge of the right to refuse consent is one factor to be taken into account" when determining the voluntariness of a consent. *Drayton*, 536 U.S., at 206 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973)). In stark contrast to the federal precedent, the Ohio Supreme Court has declared in this case that Petitioner "has no constitutional right to refuse to take a reasonably reliable chemical test for intoxication." *State v. Hoover*, 123 Ohio St. 3d 418, 423, 916 N.E.2d 1056, 1061 (2009). Such a ruling by the Ohio Supreme Court cannot stand. The State of Ohio cannot constitutionally place defendants in a situation where they must either give consent or face criminal

punishment, even if law enforcement is able to withdraw blood without consent under one of the other exceptions to the warrant requirement. See, *Schmerber*, *supra*. Every individual has an absolute constitutional right under the Fourth Amendment to the United States Constitution to refuse or revoke consent to a warrantless search. *Camara*, *supra*, *Jimeno*, *supra*, *Drayton*, *supra*, even if they are charged with drunk driving.

CONCLUSION

All fifty states and the District of Columbia have "implied consent" statutes that purport to issue a consent on behalf of all individuals for a warrantless search of their blood, breath or urine. Furthermore, almost half of all states in the Union impose criminal penalties for any effort on the part of the individual to refuse or revoke the consent to a warrantless search previously given by the legislature on their behalf. Ohio Revised Code §4511.19(A)(2) is just such a statute, imposing a criminal punishment upon Petitioner for his refusal to consent to a warrantless search of his blood, breath, or urine. Given the scope of the drunk driving problem nationwide, and given the force of the political winds blowing in favor of tough enforcement of all drunk driving laws, the need for this Court to clarify the boundary established by the Fourth Amendment cannot be understated. Therefore, this court should grant Petitioner's request for a Writ of Certiorari and reverse the decision of the

Ohio Supreme Court, reaffirming every individual's absolute constitutional right under the Fourth Amendment to refuse or to revoke consent to a warrantless search.

Respectfully submitted,

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123 Ohio St.3d 418, 916 N.E.2d 1056

Supreme Court of Ohio.
The STATE of Ohio, Appellant and Cross-Appellee,
v.
HOOVER, Appellee and Cross-Appellant.
No. 2007-2295.

Submitted Oct. 15, 2008.
Decided Sept. 30, 2009.

Richard Cordray, Attorney General, and Benjamin C. Mizer, Solicitor General; and Tim M. Aslaner, Marysville Law Director, for appellant and cross-appellee.

Jonathan T. Tyack, Columbus, for appellee and cross-appellant.

Victor R. Perez, Chief Prosecutor for the city of Cleveland, supporting the position of the state for amicus curiae city of Cleveland.

LANZINGER, J.

LANZINGER, J.

{¶ 1} In this case, we consider the constitutionality of R.C. 4511.19(A)(2), which requires the imposition of criminal penalties upon certain persons who refuse to consent to chemical testing after being arrested for operating a motor vehicle while under the influence of alcohol or a drug of abuse ("DUI").[1] We hold that R.C.

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[1] "DUI" seems to be the more popular term, but "OMVI" (operating a motor vehicle while intoxicated) and "OVI"

(Continued on following page)

4511.19(A)(2) does not violate the Fourth Amendment to the United States Constitution or Section 14, Article I of the Ohio Constitution.

I. Factual and Procedural Background

{¶ 2} In the early morning hours of September 8, 2006, Deputy Kelly S. Nawman stopped a car after she saw it cross the center line by a tire's width. Upon approaching the vehicle, she detected a strong scent of intoxicants. Corey Hoover, the appellee and cross-appellant in this case, was the driver. He admitted to having drunk some alcohol before driving, and he performed poorly on the field sobriety tests. Hoover was then arrested and read his *Miranda* rights. After being taken to the Union County Sheriff's Office, he was asked to submit to a breath-alcohol test, but he refused.

{¶ 3} Hoover was charged with violating R.C. 4511.19(A)(2), which enhances the sentence for a DUI conviction if the offender refuses to submit to a chemical test and has been convicted of a DUI violation within the past 20 years. Hoover pleaded not guilty to the charge and moved for dismissal, claiming that the refusal provision and its corresponding sentence enhancement violated his constitutional rights under the Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio

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(operating a vehicle while under the influence) are also used to refer to these offenses.

Constitution and further violated his right to due process under the United States and Ohio Constitutions.

{¶ 4} The trial court overruled the motion to dismiss, and Hoover entered a no-contest plea. The court found Hoover guilty, and because he had a prior DUI conviction within the previous six years, sentenced him to 60 days in jail (with 40 days suspended) under R.C. 4511.19(G)(1)(b)(ii), which requires imposition of a jail term of at least 20 days upon a defendant who violates R.C. 4511.19(A)(2) and has a previous DUI conviction within the past six years. If Hoover had refused to consent to a chemical test but had been convicted of DUI under R.C. 4511.19(A)(1), which does not include the element of refusing to consent, his mandatory minimum jail time would have been ten days. The trial court stayed the sentence pending Hoover's appeal.

{¶ 5} On October 29, 2007, the Third District Court of Appeals reversed the trial court, in part. It found that the enhanced sentencing under R.C. 4511.19(G)(1)(b)(ii) for a violation of R.C. 4511.19(A)(2) unconstitutionally punished Hoover for asserting his right to decline a search. The court severed from R.C. 4511.19(G)(1)(b)(ii) the portion of the statute that set forth the penalty for a violation of R.C. 4511.19(A)(2), thereby omitting a sentence provision for a violation of R.C. 4511.19(A)(2). The court held: "Since no sentence is provided, the statute must be interpreted against the state, and the defendant is entitled to the lesser sentence of all of the offenses

which are sentenced pursuant to R.C. 4511.19(G)(1)(b). Because of the prior conviction, the defendant will properly be sentenced under R.C. 4511.19(G)(1)(b)(i)." *State v. Hoover,* 173 Ohio App.3d 487, 2007-Ohio-5773, 878 N.E.2d 1116, ¶ 8. That statute imposes a mandatory minimum jail term of ten days on a defendant with a DUI conviction within the last six years. Thus, the appellate court affirmed Hoover's conviction for a violation of R.C. 4511.19(A)(2), but reversed the trial court's imposition of the sentence imposed pursuant to R.C. 4511.19(G)(1)(b)(ii).

{¶ 6} Both parties appealed. The state argues that the court of appeals erred in finding the sentence enhancement unconstitutional; Hoover argues that his conviction should have been overturned because the court should have declared R.C. 4511.19(A)(2) unconstitutional in its entirety, rather than just the related sentencing enhancement contained in R.C. 4511.19(G)(1)(b)(ii).

{¶ 7} The case is now before us upon the acceptance of a discretionary appeal and cross-appeal. *State v. Hoover*, 117 Ohio St.3d 1496, 2008-Ohio-2028, 885 N.E.2d 954.

II. Law and Analysis

{¶ 8} We first acknowledge that statutes enjoy a strong presumption of constitutionality. *State v. Carswell,* 114 Ohio St.3d 210, 2007-Ohio-3723, 871 N.E.2d 547, ¶ 6; *State v. Collier* (1991), 62 Ohio St.3d 267, 269, 581 N.E.2d 552. A statute will be upheld

unless the challenger can meet the burden of establishing beyond a reasonable doubt that the statute is unconstitutional. *State v. Tooley*, 114 Ohio St.3d 366, 2007-Ohio-3698, 872 N.E.2d 894, ¶ 29; *Collier* at 269.

A. The Criminal Statute

{¶ 9} Hoover argues that R.C. 4511.19(A)(2)[2] violates his rights under the federal and state constitutions. The statute provides:

{¶ 10} "No person who, within twenty years of the conduct described in division (A)(2)(a) of this section, previously has been convicted of or pleaded guilty to a violation of this division, a violation of division (A)(1) or (B) of this section, or a municipal OVI offense shall do both of the following:

{¶ 11} "(a) Operate any vehicle * * * within this state while under the influence of alcohol, a drug of abuse, or a combination of them;

{¶ 12} "(b) Subsequent to being arrested for operating the vehicle * * * , being asked by a law enforcement officer to submit to a chemical test or tests under [R.C. 4511.191], and being advised by the officer in accordance with [R.C. 4511.192] of the

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[2] Citations to R.C. 4511.19(A)(2) throughout this opinion refer to the version in effect on September 8, 2006, the date of Hoover's offense. Sub.S.B. No. 8, Baldwin's Ohio Legislative Service Annotated (Vol.3, 2006), L-1258, L-1306. The current version is substantively similar.

consequences of the person's refusal or submission to the test or tests, refuse to submit to the test or tests."

{¶ 13} There are three elements of a charge brought pursuant to R.C. 4511.19(A)(2): (1) a DUI conviction within 20 years of the current violation, (2) operation of a motor vehicle while under the influence of alcohol or drugs, and (3) a refusal to submit to a chemical test while under arrest for the current DUI. R.C. 4511.19(A)(1)'s only element is the operation a motor vehicle while under the influence of alcohol or drugs.

B. The Implied-Consent Statute

{¶ 14} R.C. 4511.19(A)(2) contains references to R.C. 4511.191, Ohio's implied-consent statute. As part of obtaining the privilege to drive in Ohio, a driver implicitly consents to a search, through means of a chemical test, to determine the amount of intoxicating substances in the driver's body, upon the driver's arrest for DUI. R.C. 4511.191(A)(2) states:

{¶ 15} "Any person who operates a vehicle * * * within this state * * * shall be deemed to have given consent to a chemical test or tests of the person's whole blood, blood serum or plasma, breath, or urine to determine the alcohol, drug of abuse, controlled substance, metabolite of a controlled substance, or combination content of the person's whole blood, blood serum or plasma, breath, or urine if arrested for a violation of division (A) or (B) of [R.C. 4511.19] * * * ."

{¶ 16} Furthermore, under R.C. 4511.191(B), every driver, regardless of previous offenses, also faces an administrative license suspension ("ALS") for failing to submit to a chemical test upon an arresting officer's reasonable belief of a DUI violation. The penalties for refusing to submit to a test are set forth in R.C. 4511.191(B) and run the range from a one-year suspension for first-time offenders, to a five-year suspension for persons who have refused a chemical test three or more times within six years of the current offense. Under the current version of R.C. 4511.191(B), which was not in effect at the time of Hoover's arrest, there is also a difference in degree of penalty for persons, like Hoover, who have had a DUI conviction within six years of the current offense-they face a two-year license suspension for failure to submit to testing, regardless of whether they had previously refused a test.

{¶ 17} In *State v. Starnes* (1970), 21 Ohio St.2d 38, 50 O.O.2d 84, 254 N.E.2d 675, paragraph one of the syllabus, this court found the implied-consent statute to be constitutional:

{¶ 18} "Section 4511.191, Revised Code, does not violate the search and seizure provision of the Fourth Amendment, nor the self-incrimination clause of the Fifth Amendment to the United States Constitution by providing that any operator of a motor vehicle upon the public highways in this state shall be deemed to have given consent to a chemical test to determine the alcoholic content of his blood if arrested for the offense of driving while under the

influence of alcohol. (*Schmerber v. California* [1966], 384 U.S. 757 [86 S.Ct. 1826, 16 L.Ed.2d 908]; *Westerville v. Cunningham* [1968], 15 Ohio St.2d 121 [44 O.O.2d 119, 239 N.E.2d 40], applied.)"

{¶ 19} The United States Supreme Court has held that if an officer has probable cause to arrest a driver for DUI, the result of an analysis of a blood sample taken over the driver's objection and without consent is admissible in evidence, even if no warrant had been obtained. *Schmerber v. California* (1966), 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908. The court noted that delaying the test to get a warrant would result in a loss of evidence. *Id.* at 770-771, 86 S.Ct. 1826, 16 L.Ed.2d 908. Following *Schmerber,* we held that "[o]ne accused of intoxication has no constitutional right to refuse to take a reasonably reliable chemical test for intoxication." *Westerville v. Cunningham* (1968), 15 Ohio St.2d 121, 44 O.O.2d 119, 239 N.E.2d 40, paragraph two of the syllabus.

C. Refusal to Consent

{¶ 20} To summarize, a driver's refusal to submit to chemical testing when arrested on probable cause for DUI can result in two consequences. The driver receives an ALS under R.C. 4511.191(B), and if the driver is convicted of the DUI charge and had a previous DUI conviction in the past 20 years, his or her sentence will be enhanced under R.C. 4511.19(G).

{¶ 21} It is crucial to note that the refusal to consent to testing is not, itself, a criminal offense. The activity

prohibited under R.C. 4511.19(A)(2) is operating a motor vehicle while under the influence of drugs or alcohol. A person's refusal to take a chemical test is simply an additional element that must be proven beyond a reasonable doubt along with the person's previous DUI conviction to distinguish the offense from a violation of R.C. 4511.19(A)(1)(a). Hoover's conviction under R.C. 4511.19(A)(2) meant that the mandatory minimum jail term increased from ten days, the mandatory minimum for R.C. 4511.19(A)(1)(a), to 20 days. R.C. 4511.19(G)(1)(b)(i) and (ii).

{¶ 22} Hoover contends, however, that he has a constitutional right to revoke his implied consent and that being forced by threat of punishment to submit to a chemical test violates his rights under the Fourth Amendment to the United States Constitution and Article I, Section 14 of the Ohio Constitution, which provide that persons, houses, and effects are protected against unreasonable search and seizure. However, Hoover has no constitutional right to refuse to take a reasonably reliable chemical test for intoxication. *See Cunningham,* 15 Ohio St.2d 121, 44 O.O.2d 119, 239 N.E.2d 40, paragraph two of the syllabus; *Schmerber,* 384 U.S. at 770-771, 86 S.Ct. 1826, 16 L.Ed.2d 908. Asking a driver to comply with conduct he has no right to refuse and thereafter enhancing a later sentence upon conviction does not violate the constitution.

{¶ 23} Furthermore, the request to submit to a chemical test does not occur until after probable

cause to arrest exists. In this case, the arresting officer pulled Hoover over after she saw him drive across the center line. She smelled a strong odor of intoxicants as she approached his car. Hoover admitted that he had been drinking. He then performed poorly on field sobriety tests. Because R.C. 4511.19(A)(2) requires that an officer have probable cause to arrest for DUI before requesting that a driver undergo chemical testing and because the United States Supreme Court has held that exigent circumstances justify the warrantless seizure of a blood sample in DUI cases, *Schmerber,* it is clear that R.C. 4511.19(A)(2) does not violate the Fourth Amendment to the United States Constitution or Article I, Section 14 of the Ohio Constitution.

{¶ 24} This court's statement in *State v. Gustafson* (1996), 76 Ohio St.3d 425, 439, 668 N.E.2d 435, referring to an ALS suspension for refusing to consent, also holds true under these circumstances: "[T]he act of refusing a chemical test for alcohol, standing alone, does not constitute a criminal 'offense' of any kind. Ohio police officers are not statutorily authorized to randomly demand chemical alcohol testing of Ohio drivers in the absence of an arrest for DUI, and there is no criminal charge which can be lodged for the act of refusing a chemical test. Nor does R.C. 4511.191 authorize imposition of an ALS based solely on a driver's refusal to take a chemical test. Rather, the implied consent statute authorizes a police officer to ask a driver to undergo a chemical test for alcohol *only where the officer has first determined that*

probable cause exists for arrest for the offense of driving while intoxicated." (Emphasis sic.)

{¶ 25} An administrative license suspension is an automatic consequence of a refusal to take a chemical test. R.C. 4511.191(B)(1). But imposing an ALS for refusal to take a chemical test does not preclude using the refusal as an element to enhance a DUI sentence. In *Gustafson,* we held that the punishment allowed under Ohio's implied-consent law did not violate the constitutional principle of double jeopardy. 76 Ohio St.3d 425, 668 N.E.2d 435. Both an ALS and a criminal prosecution may result from driving under the influence of drugs or alcohol and refusing to take the chemical test. After a DUI conviction, however, the ALS terminates, and the license suspension becomes part of the DUI sentence. *Id.* at paragraphs four and five of the syllabus. We recognized in *Gustafson* that both administrative regulation and criminal prosecution play a part in ensuring safety.

{¶ 26} Furthermore, we have held that "[i]n Ohio, a license to operate a motor vehicle is a privilege, and not an absolute property right." *Doyle v. Ohio Bur. of Motor Vehicles* (1990), 51 Ohio St.3d 46, 554 N.E.2d 97, paragraph two of the syllabus. "'The state has the right under its sovereign power to control automobile traffic by reasonable regulations of the circumstances under which its citizens may be licensed to operate a motor vehicle and to adopt appropriate provisions to insure competence and care on the part of licensees, to protect others using the highways; and any appropriate means adopted does not deny to a person

subject to its provisions any constitutional rights under the Constitution of the United States or the state of Ohio.'" *Id.* at 51, 554 N.E.2d 97, fn. 6, quoting *State v. Newkirk* (1968), 21 Ohio App.2d 160, 165, 50 O.O.2d 253, 255 N.E.2d 851.

{¶ 27} The subsection under which Hoover was charged, R.C. 4511.19(A)(2), was added to the Revised Code by Am.Sub.H.B. No. 163, 150 Ohio Laws, Part III, 4620, 4705, effective September 23, 2004. Its enactment shows the legislature's concern with the problems of both repeat drunk drivers and chemical-test refusals. The General Assembly addressed these problems by enhancing the sentence for a DUI conviction when the driver refuses to be tested and has previously been convicted of a DUI.

{¶ 28} The dissent argues that this court has already answered the question before us in *Wilson v. Cincinnati* (1976), 46 Ohio St.2d 138, 75 O.O.2d 190, 346 N.E.2d 666. That case, however, is readily distinguishable. First, *Wilson* involved a homeowner's failure to tender a certificate of housing inspection to a prospective buyer, hardly analogous to a DUI arrest. Second, property owners in the city of Cincinnati were required by city ordinance to have their property inspected by city officials before any sale of their property. An inspection was required even if there was no indication that the property violated any provision of the building code. Failure to have the property inspected exposed the owners to criminal sanctions. Unlike the property inspections in *Wilson*, the chemical test under discussion is not required

until after probable cause to arrest exists. Finally, the property owners in *Wilson* had a right to refuse to consent to the search of their homes. But as we previously stated, Hoover did not have a right to refuse to take a reasonably reliable chemical test for intoxication. *See Cunningham*, 15 Ohio St.2d 121, 44 O.O.2d 119, 239 N.E.2d 40, paragraph two of the syllabus.

{¶ 29} Our conclusion that R.C. 4511.19(A)(2) does not violate the Fourth Amendment to the United States Constitution is also in line with decisions from other jurisdictions. *See State v. Netland* (Minn.2009), 762 N.W.2d 202; *Rowley v. Virginia* (2006), 48 Va.App. 181, 629 S.E.2d 188; *Burnett v. Anchorage* (Alaska App.1984) 678 P.2d 1364.

III. Conclusion

{¶ 30} We hold that R.C. 4511.19(A)(2) does not violate the Fourth Amendment to the United States Constitution or Section 14, Article I of the Ohio Constitution. We therefore affirm the portion of the court of appeals judgment upholding Hoover's conviction under R.C. 4511.19(A)(2), but reverse the court of appeals judgment with respect to sentencing. We reinstate the trial court's sentence imposed upon Hoover pursuant to R.C. 4511.19(G)(1)(b)(ii).

Judgment affirmed in part and reversed in part.

LUNDBERG STRATTON, O'CONNOR, and CUPP, JJ., concur.

MOYER, C.J., and PFEIFER and O'DONNELL, JJ., dissent.

PFEIFER, J., dissenting.

{¶ 31} The majority's interpretation of R.C. 4511.19(A)(2) signals a fork in the road. R.C. 4511.19(A)(2) veers from the traditional administrative punishment for refusal to consent to a chemical test upon an arrest for DUI and goes down a separate path, beyond the regulation of licensing; for certain DUI arrestees, R.C. 4511.19(A)(2) criminalizes the refusal to take a chemical test. Since imposing a criminal penalty for refusing to consent infringes on a suspect's rights under Section 14, Article I of the Ohio Constitution and the Fourth Amendment to the United States Constitution, I dissent.

{¶ 32} This court's previous cases regarding sanctions for a DUI defendant's failure to consent to chemical tests have all involved license suspensions: "This court has historically and repeatedly characterized driver's license suspensions imposed pursuant to Ohio's implied consent statutes as being civil in nature and remedial in purpose." *State v. Gustafson* (1996), 76 Ohio St.3d 425, 440, 668 N.E.2d 435. Moreover, in *Gustafson*, this court held that "the act of refusing a chemical test for alcohol, standing alone,

does not constitute a criminal 'offense' of any kind." *Id.* at 439, 668 N.E.2d 435.

{¶ 33} The majority states in ¶ 21, "It is crucial to note that the refusal to consent to testing is not, itself, a criminal offense." Rather than crucial, that point is insignificant: R.C. 4511.19(A)(2) makes the refusal to consent to a chemical test a *central element* of a criminal offense. Without a failure to consent, there is no crime committed under R.C. 4511.19(A)(2). The majority writes in ¶ 21, "The activity prohibited under R.C. 4511.19(A)(2) is operating a motor vehicle while under the influence of drugs or alcohol." Wrong: operating a motor vehicle while under the influence is the activity prohibited under R.C. 4511.19(A)(1). R.C. 4511.19(A)(2) prohibits persons with a DUI conviction within the preceding 20 years from refusing to consent to a chemical test *after* being arrested for operating a vehicle while under the influence of drugs or alcohol. The simple fact is that for defendants like Hoover, the failure to consent results in jail time.

{¶ 34} The majority relies heavily upon this court's decision in *Westerville v. Cunningham* (1968), 15 Ohio St.2d 121, 44 O.O.2d 119, 239 N.E.2d 40, wherein the court held that "[o]ne accused of intoxication has no constitutional right to refuse to take a reasonably reliable chemical test for intoxication." *Id.* at paragraph two of the syllabus. But that case concerned a defendant's assertion of his *Fifth* Amendment rights; the defendant in *Cunningham* argued that using his refusal to submit to a chemical test as evidence against him in a trial would violate his right not to

incriminate himself. Hoover asserts here that R.C. 4511.19(A)(2) violates his *Fourth* Amendment rights, and his is not an evidentiary concern-his *liberty* is at stake.

{¶ 35} This court has previously answered the question whether a person can face *criminal* sanctions for failure to consent to a search. In *Wilson v. Cincinnati* (1976), 46 Ohio St.2d 138, 75 O.O.2d 190, 346 N.E.2d 666, this court held that the Fourth Amendment prohibits the imposition of criminal penalties upon a person who refuses to submit to a warrantless search. As here, the defendant in *Wilson* "faced * * * a serious dilemma; either [she had to] consent to a warrantless search or face the possibility of a criminal penalty." *Wilson* at 143, 346 N.E.2d 666. The ordinance at issue in *Wilson* required a homeowner, prior to entering into a contract for the sale of her property, to tender to the prospective buyer a certificate of housing inspection. A seller's failure to comply with the certificate requirement rendered the seller subject to a criminal penalty. Fourth Amendment rights were implicated because sellers could obtain the certificate only by allowing a city inspector to access their property. Thus, in order to sell his or her property, a seller had to consent to a warrantless search or face the possibility of a criminal penalty. This court held in *Wilson*:

{¶ 36} "Where a municipal ordinance requires the owner of real property to tender a certificate of housing inspection to a prospective buyer, and such certificate may be obtained only by allowing a

warrantless inspection of the property, the imposition of a criminal penalty upon the owner's failure to tender the certificate violates the owner's rights under the Fourth Amendment to the United States Constitution." *Wilson*, 46 Ohio St.2d at 138, 75 O.O.2d 190, 346 N.E.2d 666, at syllabus.

{¶ 37} As this court noted in *Wilson*, "[g]enerally, a search to which an individual consents meets Fourth Amendment requirements. *Katz v. United States* (1967), 389 U.S. 347, 358 [88 S.Ct. 507, 19 L.Ed.2d 576]." *Wilson*, 46 Ohio St.2d at 143, 75 O.O.2d 190, 346 N.E.2d 666. However, consent given in response to coercion does not meet Fourth Amendment requirements: "[A] valid consent involves a waiver of constitutional rights and cannot be lightly inferred; hence, it must be 'voluntary and uncoerced, either physically or psychologically.' *United States v. Fike* (C.A.5, 1972), 449 F.2d 191, 193; *Phelper v. Decker* (C.A.5, 1968), 401 F.2d 232; *Cipres v. United States* (C.A.9, 1965), 343 F.2d 95." *Wilson* at 143-144, 75 O.O.2d 190, 346 N.E.2d 666.

{¶ 38} In *Wilson*, this court held that the coercive nature of a potential criminal penalty negated any consent to search: "In the case before us, the coercion represented by the sole alternative of possible criminal prosecution clearly negates any 'consent' which may be inferred from the allowance of the inspection and, therefore, the validity of such searches upon the basis of consent is not sustainable." *Wilson* at 144, 75 O.O.2d 190, 346 N.E.2d 666.

{¶ 39} This case is not about whether police officers could have legally executed a chemical test on Hoover. A search can meet the requirements of the Fourth Amendment even if it is executed without a suspect's consent. Officers could have sought a warrant to obtain a test. Further, the United States Supreme Court has held that when a defendant refuses to consent to a taking of his blood for chemical analysis, a blood sample taken over his objection and without his consent is admissible in evidence, even if no warrant had been obtained, if the officer had probable cause to arrest for DUI. *Schmerber v. California* (1966), 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908. *Schmerber* thus protects the state's ability to gather evidence to prove its case without obtaining a defendant's consent. The defendant can still refuse to consent, but his failure to consent lacks strategic value because the state can find another way to acquire the necessary evidence. That is different from the majority's claim in this case that a defendant has no right to assert a refusal to consent. *Schmerber* exists *because* a defendant has the right to refuse consent.

{¶ 40} The issue here is whether the state can criminalize a person's failure to consent to a warrantless search or, in other words, force a consent to search through the coercive power of threatened jail time. Although consent is implied by R.C. 4511.191, consent can be withdrawn. "A suspect may * * * delimit as he chooses the scope of the search to which

he consents." *Florida v. Jimeno* (1991), 500 U.S. 248, 252, 111 S.Ct. 1801, 114 L.Ed.2d 297.

{¶ 41} Imposing criminal sanctions for failure to consent goes far beyond the state's power-recognized in *Gustafson,* 76 Ohio St.3d 425, 668 N.E.2d 435, and other cases-to regulate the licensure of drivers. As in *Wilson,* the statute at issue herein imposes a codified dilemma-consent to a warrantless search or face the possibility of a criminal penalty-and thus amounts to coercion. R.C. 4511.19(A)(2) therefore violates defendants' rights under the Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution. Because R.C. 4511.19(A)(2) criminalizes a suspect's failure to consent to a chemical test, I would find the statute unconstitutional.

MOYER, C.J., and O'DONNELL, J., concur in the foregoing opinion.

COURT OF APPEALS
THIRD APPELLATE DISTRICT
UNION COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

v.

COREY HOOVER,

DEFENDANT-APPELLANT.

CASE NUMBER 14-07-11

OPINION

(Filed Oct. 29, 2007)

CHARACTER OF PROCEEDINGS:
Criminal Appeal from Municipal Court.

JUDGMENT:
Judgment reversed and cause remanded.

DATE OF JUDGMENT ENTRY:
October 29, 2007

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Willamowski, J.

{¶1} Defendant-appellant Corey A. Hoover ("Hoover") brings this appeal from the judgment of the Marysville Municipal Court denying his motion to dismiss.

{¶2} On September 8, 2006, Hoover was stopped while driving his automobile by a Union County Sheriff's Deputy. Hoover refused to submit to a warrantless search to determine alcohol content, i.e. breath test in this case. As a result of the stop, Hoover was cited under R.C. 4511.19(A)(2) for driving while under the influence of alcohol. Hoover subsequently filed a motion to dismiss the charge by claiming that the statute violated his constitutional rights. On February 1, 2007, the trial court overruled the motion to dismiss. Hoover changed his plea to no contest on March 1, 2007, and the trial court, having found that Hoover was operating a motor vehicle while impaired, had a prior OVI conviction within six years, and refused to take the chemical test to determine alcohol content, ruled that Hoover was guilty of violating R.C. 4511.19(A)(2). The trial court then sentenced Hoover pursuant to the mandate of R.C. 4511.19(G)(1)(b)(ii). Hoover appeals from this judgment and raises the following assignment of error.

> **The trial court erred in overruling [Hoover's] motion to dismiss the single charge of drunk driving filed against [Hoover] pursuant to R.C. 4511.19(A)(2).**

{¶3} This court notes that although the assignment of error claims that the trial court erred in denying the motion to dismiss, the arguments raised by both Hoover and the State concern the sentence to be imposed due to a violation. Both parties argued at oral argument the constitutionality of R.C. 4511.19(A)(2) as it is incorporated into R.C. 4511.19(G)(1)(b)(ii), which is the relevant sentencing statute.

{¶4} Hoover's assignment of error concerns his motion to dismiss. Hoover in essence claims that the charge should have been dismissed because it criminalizes the refusal to take a chemical test to determine his alcohol content. Hoover was charged with violating R.C. 4511.19(A)(2) which provides as follows.

> **No person who, within twenty years of the conduct described in (A)(2)(a) of this section, previously has been convicted of or pleaded guilty to a violation of this division, division (A)(1) or (B) of this section or a municipal OVI offense shall do both of the following:**
>
> **(a) Operate any vehicle * * * within this state while under the influence of alcohol, a drug of abuse, or a combination of them;**
>
> **(b) Subsequent to being arrested for operating the vehicle * * * ,being asked by a law enforcement officer to submit to a chemical test or tests under [R.C.**

> **4511.191], and being advised by the officer in accordance with [R.C. 4511.192] of the consequences of the person's refusal or submission to the test or tests, refuse to submit to the test or tests.**

R.C. 4511.19(A)(2). The statute requires proof of more than just a refusal of the test. The basis for the criminal offense is not that the test was refused; but that the driver was under the influence at the time and that the driver had a prior OVI within the last 20 years. Since there was evidence before the trial court that Hoover was operating the motor vehicle while under the influence in addition to the other elements, the trial court did not err in denying the motion to dismiss. Thus, the assignment of error as specified is overruled.

{¶5} Although the motion to dismiss need not be granted, the arguments raised by counsel throughout the case have raised the issue of the constitutionality of increasing the sentence merely for refusing the warrantless search by way of chemical test. This is a matter of first impression in the state.[1] This court initially notes that "[a]ny person who operates a vehicle * * * upon a highway or any public or private property used by the public for vehicular travel or parking within this state or who is in physical control of a vehicle * * * shall be deemed to have given

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[1] This is probably a matter of first impression because defendants in cases such as this are typically charged under both R.C. 4511.19(A)(1) and (A)(2).

consent to a chemical test or tests of the person's whole blood, blood serum or plasma, breath, or urine to determine the alcohol, * * * content of the person's whole blood, blood serum or plasma, breath, or urine if arrested for a violation of [R.C. 4511.19(A) or (B)] * * * . R.C. 4511.19.1(A)(2). By driving a vehicle upon the road, the driver consents to a search to determine his or her alcohol content upon probable cause of the officer. At the time of the stop, Hoover withdrew his implied consent to search. A withdrawal of this consent results in a suspension of the driver's license to drive. R.C. 4511.19.1(B). This statute has been reviewed and found to be constitutional by the Ohio Supreme Court. See *McNulty v. Curry* (1975), 42 Ohio St.2d 341, 328 N.E.2d 798; *Hoban v. Rice* (1971), 25 Ohio St.2d 111, 267 N.E.2d 311; and *State v. Starnes* (1970), 21 Ohio St.2d 38, 254 N.E.2d 675. Specifically, the implied consent statute was found not to violate the fourth or fourteenth amendments of the U.S. Constitution. *Starnes*, supra.

{¶6} Hoover argues that in this case, his criminal punishment is enhanced solely because he withdrew his consent. The only difference between a charge pursuant to R.C. 4511.19(A)(2) and R.C. 4511.19(A)(1) is the defendant's revocation of the consent to the warrantless search to determine alcohol content, i.e. breath test in this case. The U.S. Supreme Court has previously held that the use of a chemical test to determine alcohol content of a person is a search under the Fourth Amendment. *Schmerber v. California* (1966), 384 U.S. 757, 86 S.Ct. 1826, 16

L.Ed.2d 908. As discussed above, there are administrative consequences for revoking one's consent to the warrantless search which have been found to be constitutional. However, in this case, the minimum criminal penalty is doubled solely because Hoover revoked his consent to the warrantless search. One convicted under R.C. 4511.19(A)(1)(a-e) who has a prior conviction within six years must serve a mandatory jail term of not less than ten days. R.C. 4511.19(G)(1)(b)(i). That same defendant would be required to serve a minimum mandatory jail term of twenty days if he or she were to revoke the consent to search. R.C. 4511.19(G)(1)(b)(ii). Thus, the minimum criminal penalty to be imposed is doubled merely because a defendant revokes his or her consent to search.[2]

{¶7} The question of whether a breath test is a search under the fourth amendment has been decided in the affirmative. *Schmerber*, supra. A state is permitted to require consent to this search in order to obtain a drivers license. Id. As discussed above, R.C. 4511.191 does require a motorist to give consent or face administrative penalties. However, the statute does not force a person to submit to a test. *Maumee v. Anistik* (1994), 69 Ohio St.3d 339, 342, 632 N.E.2d 497. A person may revoke his or her implied consent

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[2] This court notes that the State is not prohibited from conducting the search, just from conducting the search without a court order. The State can still obtain a court order for a chemical test and the defendant would be compelled to comply.

to the warrantless search to determine alcohol content after being informed of the consequences of doing so by the officer. Id. The Ohio Supreme Court has previously held that the Fourth Amendment prohibits placing a defendant in a position of choosing between allowing a warrantless search or facing criminal penalties. *Wilson v. Cincinnati* (1976), 46 Ohio St.2d 138, 346 N.E.2d 666. Although the facts in *Wilson* concerned a property inspection, the underlying philosophy is that a defendant cannot be criminally penalized for exercising a constitutional right to revoke consent. *State v. Scott M.* (1999), 135 Ohio App.3d 253, 733 N.E.2d 653 (citing *Camara v. Mun. Court of San Francisco* (1967), 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930). A suspect may limit or revoke consent to a warrantless search even after the search has begun. *State v. Riggins*, 1st Dist. No. C-030626, 2004-Ohio-4247 ¶27. The use of the implied consent statute can constitutionally require one to consent to a warrantless search or face administrative consequences. It cannot require that one comply or face criminal sanctions. "[T]he act of refusing a chemical test for alcohol, standing alone, does not constitute a criminal 'offense' of any kind." *State v. Gustafson* (1996), 76 Ohio St.3d 425, 439, 668 N.E.2d 435. "[The Ohio Supreme Court] has historically and repeatedly characterized driver's license suspensions imposed pursuant to Ohio's implied consent statutes as being civil in nature and remedial in purpose." Id. at 440. To apply a criminal penalty to the exercise of a constitutional right, the right to refuse a warrantless search by the government, is improper. See *State v.*

Morris, 159 Ohio App.3d 775, 2005-Ohio-962, 825 N.E.2d 637 (finding it improper to increase sentence due to defendant's exercise of right to a jury trial); *State v. Glass*, 8th Dist. No. 83950, 2004-Ohio-4495 (holding it improper for trial court to use exercise of constitutional right as an aggravating factor in sentencing); and *State v. Scott*, 4th Dist. No. 06CA3, 2006-Ohio-4731 (holding it improper for trial court to increase a sentence due to exercise of a right to trial). Since the only difference between a minimum mandatory sentence of ten days and a minimum mandatory sentence of twenty days is the revocation of the consent to a warrantless search, a criminal penalty is being imposed for the refusal, which is not in and of itself a criminal offense.[3]

{¶8} Having found a constitutional problem with the application of the sentencing portion of the statute, the next question is what to do about the problem. "If any provisions of a section of the Revised Code or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end the provisions are severable." R.C. 1.50. Severance is only appropriate when 1) the constitutional and

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[3] A review of the statute seems to indicate that a similar problem may be found in R.C. 4511.19(G)(1)(a)(ii). However, this issue was not raised in this matter and is not addressed by this court.

unconstitutional parts are capable of separation so that each may be read and may stand by itself; 2) that the unconstitutional part is not so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the legislature if the clause or part is stricken; and 3) the insertion of words or terms is not necessary to give effect only to the constitutional portion. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, ¶95, 845 N.E.2d 470 (citing *Geiger v. Geiger* (1927), 117 Ohio St. 451, 160 N.E.2d 28). A review of the statute in question indicates that severance in this case is appropriate. The statute as written currently reads as follows.

> **(ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, except as otherwise provided in this division, a mandatory jail term of twenty consecutive days.**

R.C. 4511.19(G)(1)(b)(ii). This court severs the phrase "or division (A)(2)" from the statute.[4] By doing so, the minimum mandatory criminal penalty is not increased due to the refusal to consent to search without a warrant. The result is that a conviction under R.C. 4511.19(A)(2) with a prior conviction in the past six

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[4] The statute in question was in effect from August 17, 2006, until April 4, 2007. However, this court notes that the current version of the statute contains the same language as the one in effect at the time of Hoover's offense.

years does not have a listed sentence. Since no sentence is provided, the statute must be interpreted against the state, and the defendant is entitled to the lesser sentence of all of the offenses, which are sentenced pursuant to R.C. 4511.19(G)(1)(b). Because of the prior conviction, the defendant will properly be sentenced under R.C. 4511.19(G)(1)(b)(i). This statute provides for a minimum, mandatory jail term of ten consecutive days for one who has a previous conviction for OVI within the last six years. R.C. 4511.19(G)(1)(b)(i).[5] Thus, this is the sentence which should be imposed for a violation of R.C. 4511.19(A)(2) when the prior OVI occurred within the last six years.

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[5] Although this court realizes that some could argue that this severance might encourage offenders to refuse the test, the constitution requires that their right to exercise their constitutional rights be protected without threat of punishment by the government for doing so. A refusal still results in administrative penalties and does not prevent the State from using the refusal to infer intoxication at trial. Thus, the ruling does not affect the State's ability to obtain a conviction for operating a motor vehicle while under the influence, which is the purpose of the statute. The sole effect of this ruling is to prevent the state from criminally penalizing the exercise of a constitutional right.

{¶9} For the reason set forth above, the judgment of the Marysville Municipal Court is reversed and the matter is remanded for resentencing consistent with this opinion.

Judgment reversed and cause remanded.

ROGERS, P.J., and PRESTON, J., concur.
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IN THE MARYSVILLE MUNICIPAL COURT
UNION COUNTY, OHIO

STATE OF OHIO	CASE NO. 06 TRC 5650
vs.	***JOURNAL ENTRY***
COREY A. HOOVER	(Filed Feb. 1, 2007)

This matter comes on for hearing on the Defendant's motion to dismiss. Based upon the pleadings and motions filed, the motion is OVERRULED.

This case is scheduled for Pretrial Conference on February 16, 2007.

/s/ Michael J. Grigsby
Judge Michael J. Grigsby

Dist. ☑ Jonathan T. Tyack, Defendant's Attorney
☐ Tim Aslaner, Prosecutor

The Supreme Court of Ohio

State of Ohio	Case No. 2007-2295
v.	RECONSIDERATION ENTRY
Corey Hoover	(Filed Dec. 2, 2009)
	Union County

It is ordered by the Court that the motion for reconsideration in this case is denied.

(Union County Court of Appeals; No. 140711)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

IN THE MARYSVILLE MUNICIPAL COURT, MARYSVILLE, OHIO

STATE OF OHIO	:	
Plaintiff,	:	
	:	CASE NO. TRC 0605650
vs.	:	
	:	JUDGE GRIGSBY
COREY A. HOOVER,	:	
Defendant.	:	

MOTION TO DISMISS

(Filed Oct. 20, 2006)

Now come Defendant, Corey A. Hoover, by and through undersigned counsel, and respectfully moves this Court to dismiss the Complaint in the within action. The Complaint must be dismissed as the statute in question violates Defendant's rights under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, along with the comparable provisions of the Ohio Constitution. A Memorandum in Support is attached hereto.

Respectfully submitted,

/s/ Jonathan T. Tyack

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MEMORANDUM IN SUPPORT

In this case, Defendant is charged with a violation of Revised Code §4511.19(A)(2) creating a separate offense, or alternatively enhancing the penalties, as a result of the Defendant's alleged refusal to take a breath test in this matter. By punishing Defendant for his exercise of his constitutional right to refuse a breath test, the State of Ohio seeks to violate Defendant's right under the Fourth Amendment to the United States Constitution, along with the comparable provisions under the Ohio Constitution. Furthermore, the State of Ohio seeks to violate Defendant's right to Due Process of law under the Fifth and Fourteenth Amendments to the United States Constitution, and the comparable provisions granting Due Process under the Ohio Constitution.

It is well settled that the taking of a blood, breath, or urine specimen falls within the search and seizure protections of the Fourth Amendment. *Schmerber v. California* (1966), 384 U.S. 757. Furthermore, the taking of a sample of a bodily substance, whether it be blood, breath, or urine, triggers the Due Process protections provided in the Federal and State Constitutions. See *State v. Sisler* (2nd Dist. 1995), 114 Ohio App. 3d 337 (ruling that a blood sample can not be taken by force over a defendant's objection because it violates due process of law).

United States Supreme Court, in *Camara v. Municipal Court* (1967), 387 U.S. 523, held that it was unconstitutional to prosecute and convict a person for

a crime when the criminal offense was defined as a defendant's refusal to permit a search or seizure. In other words, the United States Supreme Court in *Camara*, *supra*, clearly held that the State of Ohio, or any other governmental entity, can not criminalize the act of refusing consent to a warrantless search or seizure. *Id.* Here, the State of Ohio, seeks to punish Defendant for his refusal to consent to a warrantless search and seizure via a breath test. Such punitive action by the State of Ohio violates Defendant's constitutional rights under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution.

Consequently, for the reasons set forth above, the Defendant is entitled to have this case dismissed.

/s/ Jonathan T. Tyack
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Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing Motion has been forwarded to Tim Aslaner, Esq., Union County Prosecuting Attorney's Office, 221 W. 5th Street, Marysville, Ohio 43040, this 19 day of October, 2006.

/s/ Jonathan T. Tyack
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